

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RORY L MICKENS,

Petitioner,

v.

AL SMACK,

Respondent.

CASE NO. 3:20-CV-05325-RAJ-DWC

ORDER

The District Court has referred this action filed under 28 U.S.C. § 2254 to United States Magistrate Judge David W. Christel. Respondent answered the Petition in August 2020. Dkt. 22. The Court has granted Petitioner several extensions of time to file a traverse to Respondent's Answer. Dkt. 21, 30, 35, 42.

Currently pending in this action are two partial motions filed by Petitioner Rory L Mickens: (1) Motion to Appoint Counsel (Dkt. 50) and (2) Motion to Amend Complaint, for

1 Appointment of Counsel, Americans with Disabilities Act (“ADA”) Provider Assistance, and  
2 Consolidate with 20-5259-RJB (Dkt. 52).<sup>1</sup>

3       Petitioner moves for the appointment of counsel and ADA assistance. Dkt. 50, 52.  
4 Petitioner alleges he cannot electronically file his pleadings and does not have access to a  
5 computer. Dkt. 50 at 2. Petitioner alleges he does not have his transcripts and cannot afford to  
6 ship his legal boxes to his new prison facility. *Id.* Petitioner also asks for ADA assistance  
7 because he has been without his ADA access assistant for more than a month. Dkt. 52 at 2.  
8 Petitioner alleges he has ADHD, forgets issues, and confuses facts, dates, and times. Dkt. 52.

9       The Court previously denied Petitioner’s request for counsel, because he had not  
10 demonstrated he was likely to succeed on the merits, his claims were not unusually complex, and  
11 Petitioner was able to capably litigate this case and articulate his claims with the assistance of his  
12 ADA access assistant. Dkt. 42 (finding in September 2020, while housed at SCCC, Petitioner  
13 was granted an ADA access assistant who assisted Petitioner with reading and writing of  
14 material in the law library, reading call outs, and homework and/or writing).

15       Petitioner was transferred to Cedar Creek Corrections Center and then to the Longview  
16 Work Release Facility. *See* Dkt. 47; docket entry dated March 15, 2021; Dkt. 57. Based on the  
17 allegations now before the Court, that Petitioner was no longer being provided with his ADA  
18 access assistant and he did not have access to his legal materials, the Court ordered Respondent  
19 to file a status update on or before May 21, 2021. *See* Dkt. 50, 52, 55.

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22       <sup>1</sup> The Court previously denied Petitioner’s request to amend and consolidate (Dkt. 52, in part) and re-noted  
23 the remaining Motions for May 21, 2021 upon consideration of Respondent’s status report. Dkt. 55. The Clerk’s  
24 Office was directed to terminate the pending noting date for the Petition (currently set for consideration on May 14,  
2021) and upon the filing of Respondent’s status report, the Court stated it would set the date for filing Petitioner’s  
traverse and consideration of the Petition. Dkt. 55.

1 On May 18, 2021, Respondent filed his Status Report and a declaration from Community  
2 Corrections Supervisor Justin W. Childers, regarding Petitioner's access to an ADA assistant and  
3 legal materials at his new location in the Longview Work Release Facility. Dkt. 56, 57.

4 According to the declaration, Mr. Childers met with Petitioner on May 17, 2021, and Petitioner  
5 confirmed with Mr. Childers that he did not need ADA assistance while he is a resident of the  
6 Longview Work Release Facility. Dkt. 57 at 1. In addition, Mr. Childers explained that while the  
7 public law library was closed, Petitioner could use a self-supplied tablet to access the internet for  
8 legal research and Petitioner was agreeable to that solution. *See* Dkt. 57 at 1. *See also*

9 <https://cowlitzsuperiorcourt.us/newsfeed/court-news/entry/public-law-library-updated>. Finally,  
10 Mr. Childers emailed the Superintendent of the CCCC and requested that the facility ship the  
11 legal materials to the Longview Work Release Facility at no charge to Petitioner. Dkt. 57 at 2.

12 On June 1, 2021, Petitioner filed a one-page response to the Court's Order, stating he is  
13 still without ADA assistance and reiterating his request for the appointment counsel. Dkt. 58.  
14 Petitioner did not provide any additional information or argument as to why the appointment of  
15 counsel is necessary. *See id.*

16 There is no right appointed counsel in cases brought under 28 U.S.C. § 2254 unless an  
17 evidentiary hearing is required, or such appointment is necessary for the effective utilization of  
18 discovery procedures. *See McCleskey v. Zant*, 499 U.S. 467, 495 (1991); *United States v.*  
19 *Duarte-Higareda*, 68 F.3d 369, 370 (9th Cir. 1995); *United States v. Angelone*, 894 F.2d 1129,  
20 1130 (9th Cir. 1990); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983); Rules Governing  
21 Section 2254 Cases in the United States District Courts 6(a) and 8(c). The Court may appoint  
22 counsel "at any stage of the case if the interest of justice so require." *Weygandt*, 718 F.2d at 954.  
23 In deciding whether to appoint counsel, the Court "must evaluate the likelihood of success on  
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1 the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the  
2 complexity of the legal issues involved.” *Id.*

3 The Court has not determined an evidentiary hearing is necessary or proper in this case.  
4 Therefore, whether the Court should appoint counsel depends on whether the interests of justice  
5 require counsel. *See id.* The declaration submitted by Respondent provides Petitioner has  
6 declined assistance of an ADA assistant to help with reading and writing, Petitioner’s legal  
7 materials have been sent to him free of charge, and he has access to a tablet for legal research  
8 while on work release. Dkt. 56, 57. Petitioner agreed to Mr. Childers’ accommodations, and  
9 Petitioner has not offered any additional information or details as to why the interests of justice  
10 warrant the appointment of counsel. *See id.*; Dkt. 58. Petitioner does not demonstrate he is likely  
11 to succeed on the merits or that his claims or Respondent’s defenses are unusually complex, at  
12 least beyond the complexity endemic to such constitutional issues. *See* Dkt. 50, 52, 58. Rather,  
13 Petitioner’s claims appear to be the typical claims which arise in criminal appeals and habeas  
14 petitions. *See Weygandt*, 718 F.2d at 954 (explaining that the likelihood of success on the merits  
15 and the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the  
16 legal issues involved are considerations “inextricably enmeshed” with the underlying claim).

17 Accordingly, the Court does not find that the interests of justice require the appointment  
18 of counsel at this time. Therefore, in its discretion, the Court denies Petitioner’s request to  
19 appoint counsel (Dkt. 50, 52).

20 Because Petitioner has not yet filed his traverse (response to the Answer), the Court  
21 grants Petitioner one short and final extension. Petitioner may file his traverse on or before July  
22 9, 2021. Respondent may file a reply on or before July 16, 2021. Petitioner has now been  
23 granted  
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1 multiple extensions of time to file his traverse, and no further extensions of time will be granted  
2 absent extraordinary cause.

3 The Clerk is directed to re-note the Petition (Dkt. 8) for consideration on July 16, 2021.

4 Dated this 9th day of June, 2021.

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7 David W. Christel  
8 United States Magistrate Judge  
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